No. 84-139

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CLARENCE R. YEAGER DISTRIBUTING, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
and
ARIZONA STATE DISTRICT COUNCIL
OF CARPENTERS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. IN THE ABSENCE OF AN ELECTION AND BOARD CERTIFICATION, CAN THE NLRB FIND CURRENT UNION MAJORITY STATUS SUFFICIENT TO IMPOSE A DUTY TO BARGAIN BASED ON EVIDENCE OF UNION MEMBERSHIP EXISTING YEARS PRIOR TO AN ELECTION PETITION, CONSISTENT WITH SECTIONS 7 AND 10(b) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U.S.C. § 151 *ET SEQ.*?

2. CAN THE NLRB EVER APPLY AN IRREBUTTABLE PRESUMPTION OF UNION MAJORITY STATUS TO DISMISS AN ELECTION PETITION IN THE ABSENCE OF A BOARD CERTIFICATION?

a. IN THE ABSENCE OF AN ELECTION AND BOARD CERTIFICATION, CAN THE NLRB IRREBUTTABLY PRESUME THE EXISTENCE OF UNION MAJORITY STATUS TO CREATE A DUTY TO BARGAIN?

b. ASSUMING THAT AN IRREBUTABLE PRESUMPTION OF UNION MAJORITY STATUS IS EVER APPROPRIATE, CAN THE NLRB APPLY SUCH A PRESUMPTION TO CREATE A DUTY TO BARGAIN WHERE THE UNION'S CURRENT LACK OF MAJORITY STATUS IS UNDISPUTED?

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Petitioner, Clarence R. Yeager Distributing, Inc. ("Yeager" or the "Employer"), prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit. The Court of Appeals entered its judgment on September 26, 1983, granting enforcement of an order of the National Labor Relations Board (the "Board" or "NLRB"). Petitioner's request for rehearing and suggestion for rehearing *en banc* was denied on April 25, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit and its order denying the request for rehearing and

suggestion for rehearing *en banc* are unreported (Appendices A, pp.1a-7a, and B, p.8a). The decision and order of the National Labor Relations Board in unfair labor practice Case 28-CA-5578 is reported at 261 N.L.R.B. 847 (Appendix C, pp.9a-22a). The opinions of the Board and the Regional Director in representation Case 28-RM-379, which precede and underlie the unfair labor practice case, are unreported (Appendices D, pp.23a-24a and E, pp.25a-36a). The Board's order denying alternative motions to reconsider and/or reopen the hearing in Case 28-RM-379 is unreported (Appendix F, pp.37a-38a).

JURISDICTION

The Court of Appeals' judgment was entered on September 26, 1983 (Appendix G, p.39a). This petition was filed within 90 days of the court's denial of Petitioner's request for rehearing and suggestion for rehearing *en banc* on April 25, 1984. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

This case directly involves Sections 7, 8, 9 and 10 of the National Labor Relations Act, as amended ("NLRA" or the "Act"), 29 U.S.C. §§ 157, 158, 159, and 160, and the Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V (Appendix H, pp.40a-49a).

STATEMENT OF THE CASE

1. Procedural History

On October 15, 1979, Yeager filed an employer's election petition pursuant to Section 9(c) of the Act in Case 28-RM-379. The purpose of that petition was to allow Yeager's employees to decide whether a majority desired the Arizona State District Council of Carpenters (the "Union") as their

collective bargaining representative. Yeager at that time also filed an unfair labor practice charge against the Union in Case 28-CB-1546, alleging violations of Sections 8(b)(1)(A) and 8(b)(2) of the Act. A complaint was issued by the Regional Director of Region 28 on behalf of the Board's General Counsel (Appendix I, pp.50a-53a). Case 28-CB-1546 was unilaterally settled by the Director and affirmed by the General Counsel over Yeager's objections (Appendix J, pp.54a-55a).

In response to Yeager's election petition and charge, the Union filed its unfair labor practice charge against Yeager in Case 28-CA-5578 on October 26, 1979. On January 30, 1981, a complaint was issued on behalf of the Board's General Counsel alleging that Yeager had violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act.

On May 13, 1982, the Board granted General Counsel's motion for summary judgment on the Sections 8(a)(1) and 8(a)(5) allegations based on the record in the previous election proceedings and found it unnecessary to address the Section 8(a)(3) allegation. The Board's decision and final order in Case 28-CA-5578, along with the decisions of the Regional Director and Board in the election proceedings, were brought before the Ninth Circuit Court of Appeals on Yeager's petition for review and the Board's cross application for enforcement pursuant to Sections 10(e) and 10(f) of the Act. The Union intervened in the appeal. Oral argument was heard on June 13, 1983, and the court entered its memorandum opinion and judgment on September 26, 1983. Yeager's request for rehearing and suggestion for rehearing *en banc* was denied on April 25, 1984. This petition followed.

2. Factual Background

Yeager is a specialty contractor who fabricates, warehouses, sells, installs, and services garage doors in the construction industry through its Phoenix and Tucson, Arizona, facilities. On September 11, 1962, Yeager signed a short form memorandum agreement which incorporated the

terms of an area-wide master labor agreement negotiated between the Union and the Associated General Contractors, a multi-employer bargaining association. The term of that master agreement was June 25, 1962, to May 31, 1965. Yeager executed similar memorandum agreements on February 21, 1966, January 18, 1971, and January 25, 1977. The 1977 memorandum agreement purported to bind Yeager to a 1976-79 master agreement and any successor agreements, amendments, extensions, or renewals.

Yeager signed these memorandum agreements because the Union refused to refer qualified employees without such an agreement. No Employer officials ever saw copies of the master labor agreements prior to October 1979. Instead, the wages and fringe benefits established by the master agreements were provided to Yeager in annual letters from the Union.

Since signing the first memorandum agreement in 1962, Yeager paid the wages and fringe benefits described in the Union's annual letters only to his employees who said they were Union members. He paid different wages and fringe benefits to non-member employees. The non-Union wages and fringe benefits were consistently posted on employee bulletin boards. The employees themselves knew about the difference between Union and non-Union wages and benefits. The Union knew or certainly should have known about the difference.

Yeager, by both word and deed, conducted his business under a "member's only" Union contract for over 17 years with the Union's knowledge and acquiescence.

(a) *The Union's Coercion Of Yeager's Employees*

Jack Greene became the Union's new Executive Secretary in March 1979. In August 1979, upon learning of the low Union membership among Yeager's employees, Greene told Yeager to fire non-members if they would not join the Union. Yeager refused to do this. Greene asked for a list of Yeager's installers, servicemen, and helpers to facilitate organizing these employees. Yeager complied. Greene at that

time admitted that only 15 percent of Yeager's employees were Union members. By September 1979, Greene had threatened at least one of Yeager's employees with discharge if the employee resigned Union membership.

Yeager then filed an unfair labor practice charge against the Union in Case 28-CB-1546. The Regional Director issued a complaint alleging unlawful coercion by the Union in violation of Sections 8(b)(1)(A) and 8(b)(2) of the Act. The case was settled unilaterally by the Regional Director and affirmed by the General Counsel over Yeager's objections. The General Counsel found: "the [Employer] has not been harmed by the settlement agreement since it does not preclude the [Employer] from arguing before an administrative law judge that the Union's alleged coercion of employees in some way exonerates the Employer's action." (Appendix J, p. 54a).

Yeager has never been afforded the promised opportunity to present his case to an administrative law judge who, unlike the Regional Director and Board in the election proceedings, has the authority to observe witness demeanor and resolve credibility issues.

(b) *Yeager's Request For An Election*

Yeager believed his employees in 1979 were entitled to choose whether they wanted the Union as their collective bargaining representative, and filed his election petition in Case 28-RM-379. The Union countered with its unfair labor practice charge against Yeager in Case 28-CA-5578.

At the December 1979 hearing, Yeager sought an election in the bargaining unit comprised of his warehousemen, apprentices/helpers, installers, servicemen, and salesmen. The Union argued that the election petition should be dismissed because of the Board's "contract-bar" policy. This policy prevents an employer from raising a question concerning representation during the term of a collective bargaining agreement. *See Appalachian Shale Products Co.*, 121 N.L.R.B. 1160 (1958). The Union claimed the 1979-82 master labor agreement barred Yeager's October 15, 1979,

election petition based on evidence of Union majority support from 1964 to 1969.

Yeager maintained that the 1979-82 master agreement was a "members-only" contract which could not, by definition, bar an election. Since 1962, Yeager had consistently modified and repudiated all such agreements by paying contract wages and benefits only to Union members. Yeager applied the agreements only to Union members with the knowledge and acquiescence of the Union. Because a members only contract does not create a presumption of majority status, it cannot bar an election. *See N. Sumergrade & Sons*, 121 N.L.R.B. 667 (1958).

The Regional Director and Board found in the non-adversarial election proceeding that the Union had not acquiesced in Yeager's members only application of the master agreements. The Regional Director made this "finding" in a pre-election hearing at which credibility determinations are improper due to the nature of the proceeding. Nevertheless, the Regional Director credited the testimony of Union witnesses unfamiliar with past Union administrations over the undisputed evidence that Yeager consistently posted the non-member annual wage rates and fringe benefits during the preceding 17 years. At no time prior to 1979 had the Union complained, grieved, or objected to Yeager's members only application of the agreements to his employees. The Union did not appoint a steward to police those agreements.

The memorandum agreements signed by Yeager were nothing more than pre-hire agreements permitted by Section 8(f) of the Act where a union does not represent a majority of an employer's employees in the construction industry. Under the second proviso of Section 8(f), the master labor agreement cannot possibly bar an election among those employees. *NLRB v. Local 103, International Association of Bridge, Structural and Ornamental Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335, 345 (1978).

(c) *Alleged Union Majority Status In 1964*

The Union argued that the parties' relationship had converted into a formal collective bargaining relationship pursuant to Section 9(a) of the Act. Yeager believed he was litigating majority status during the term of the 1979-82 master agreement asserted as the contract bar, not a term 10 to 15 years earlier. The Board, however, found that between 1964 and 1969, "it appears that the Employer had in his employ . . . only 3 to 6 employees" in the bargaining unit, and that most or all of these 3 to 6 employees were Union members (App.E, pp. 32a-33a).

The Board's finding of majority status derived from Union membership records and trust fund reports. This evidence merely confirmed Yeager's contention that Union wages and fringe benefits were paid only to Union members. Yeager in 1979 no longer possessed payroll records from 1964 to 1969. The witnesses who testified at the election hearing remembered several other unit employees worked for Yeager during the 1964 to 1969 period. Under the pressure of testifying about events which occurred 10 to 15 years earlier, however, none of these witnesses could recall the names of these other employees.

Based on its perception of a 3 to 6 employee complement of Union members in 1964 to 1969, the Board found:

> an *irrebuttable* presumption of majority status flowed from the successive Union-Association contracts during the terms of those successive agreements. Therefore, the majority status, which was enjoyed by the Union, gives rise to a presumption of continued majority status which cannot be questioned during the term of the 1979-1982 contract. (Emphasis added.)

(App.E, p. 34a). The Board imposed this irrebuttable presumption retroactively over a period of 10 to 15 years to "prove" in 1979 what was thought to be true during 1964 to 1969.

Out of the 38 to 41 unit employees who Yeager employed in mid-August 1979, only 10 to 13 were Union members. The

Board ignored Jack Greene's August 1979 admission that only 15 percent of Yeager's then current employees were Union members. It refused to consider the Union's unlawful attempt to coerce Yeager's employees in mid-1979 as established in the complaint and settlement of Case 28-CB-1546, despite previous assurances that Yeager would be allowed to raise this defense (App. J, p. 54a).

After the Board affirmed dismissal of the election petition, Yeager moved to reopen the record and/or have the case reconsidered on the basis of affidavits submitted to demonstrate that what appeared to be only a 3 to 6 employee bargaining unit was in fact much larger. John Owen Briggs' affidavit lists 10 additional regular, full-time employees who performed installation work for Yeager during 1964 to 1969, none of whom were Union members (Appendix K, pp. 56a-57a). James Yeager's affidavit corroborates Briggs' affidavit (Appendix L, pp. 58a-59a). He recalled 8 of the 10 installers listed by Briggs and 5 other installers, all of whom were non-Union employees. Tommy Evans recalled nine of the same installers listed by Briggs and Yeager, plus one who neither of them listed (Appendix M, p. 60a). The motions to reopen and/or reconsider were summarily denied by the Board without explanation.

(d) *The Unfair Labor Practice Proceedings*

Following the Board's dismissal of Yeager's election petition, a complaint was issued in Case 28-CA-5578 alleging that Yeager had violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act because of his failure to adhere to the 1979-82 master labor agreement. The General Counsel moved for summary judgment based on the record in the previous election proceedings.

The Board granted summary judgment as to the Section 8(a)(5) and Section 8(a)(1) allegations. It found that all issues in the unfair labor practice case could have been litigated in the underlying representation case and that no issues of material fact existed which would preclude summary judgment. Yeager was ordered to: (1) abide by the

1979-82 master agreement; (2) make employees and the employee trust funds whole in accordance with the terms of that agreement; (3) submit trust fund reporting forms; and (4) recognize and bargain with the Union.

(e) *The Appeal To The Ninth Circuit*

The Ninth Circuit Court of Appeals enforced the Board's order in a memorandum opinion. Addressing the issue of whether the Board properly relied on proof of majority status during 1964 to 1969 to prove a violation in 1979, the court misapplied the six month limitations period of Section 10(b) of the Act as interpreted by this Court in *Local 1424, International Association of Machinists v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960). The Court of Appeals found that *Bryan Manufacturing* did not bar consideration of the evidence and narrowly interpreted that case to require exclusion of only unfair labor practices which occurred beyond the Section 10(b) period. It failed to consider the effect of its decision on all construction industry employers who regularly sign Section 8(f) prehire agreements with labor unions.

The Ninth Circuit ignored Yeager's argument that the Board improperly applied an irrebuttable presumption of Union majority during the 1979-82 contract term based on evidence of majority 10 to 15 years earlier. It apparently concluded that application of an irrebuttable presumption of majority did not deny Yeager due process of law. The court also refused to follow its own precedent that collective bargaining agreements give rise to a rebuttable presumption, not an irrebuttable presumption, of majority status.

An irrebuttable presumption of union majority which spans 15 years of employer-employee relations is unreasonable and arbitrary within the circumstances presented by this case.

REASONS FOR GRANTING THE WRIT

Question 1

I. THE NINTH CIRCUIT'S DECISION SUBVERTS THIS COURT'S APPLICATION OF THE SECTION 10(b) LIMITATIONS PERIOD IN *BRYAN MANUFACTURING.*

Yeager contends that under *Local 1424, International Association of Machinists v. NLRB (Bryan Manufacturing Co.),* 362 U.S. 411 (1960), the Board was barred by Section 10(b) of the Act from relying on evidence of purported Union majority status from 1964 to 1969 to prove an alleged unfair labor practice in 1979 within the Section 10(b) limitations period. Section 10(b) provides:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .

Since it was undisputed that the Union did not have a majority during this six month period, a material element of the charges filed against Yeager did not exist and the Board's complaint should have been dismissed.

Bryan Manufacturing addressed two possible situations which may arise in this context. The first is where events within the Section 10(b) period in and of themselves constitute an unfair labor practice. In these instances, pre-10(b) evidence may be considered to "shed light" on violations of the Act occurring within the limitations period. The second occurs where events within the Section 10(b) period do not amount to an unfair labor practice except for reliance on pre-10(b) evidence. In these instances, Section 10(b) prohibits use of the time-barred evidence to "cloak with illegality that which was otherwise lawful." 362 U.S. at 417.

The Board and Court of Appeals refused to exclude evidence of Union majority 10 to 15 years prior to the charges brought against Yeager. According to the court, Section 10(b) was inapplicable unless "conduct within the limitations period can be charged to be an unfair labor

practice only through reliance on an earlier unfair labor practice." (Appendix A at pp. 5a-6a). Thus, the court found that the memorandum agreement signed by Yeager in 1962 created, as if by magic, a formal collective bargaining agreement which could be enforced in 1979.

In *Bryan Manufacturing*, a non-majority union and an employer executed a collective bargaining agreement containing exclusive recognition and union security clauses. The agreement was lawful on its face. The Board held that enforcement of the agreement was unlawful because of the union's minority status at the time of its execution. The agreement had been entered into outside the six-month limitations period established by Section 10(b).

This Court ruled that the Board had improperly relied on the pre-10(b) evidence to establish a violation of the Act within the six-month period. The policies underlying Section 10(b) are equally appropriate to bar evidence of the Union's alleged early majority status in this case:

> These policies are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' . . . .

Bryan Manufacturing, 362 U.S. at 419 (citations and footnote omitted).

Here, there was no evidence that the Union represented a majority of Yeager's employees in 1962 when Yeager signed the first memorandum agreement. The parties had entered into a lawful prehire agreement under Section 8(f) of the Act. Yeager could repudiate or modify any such agreement at any time because the agreement did not create a presumption of Union majority status. *NLRB v. Local 103, International Association of Bridge, Structural and Ornamental Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978); *R.J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), *rev'd*, 480 F.2d 1186 (D.C. Cir. 1973).

Proof that a union majority existed at the time of an alleged refusal to bargain is a material element in establishing a violation of Section 8(a)(5). There was no evidence that the Union represented a majority of Yeager's employees at any time within the Section 10(b) limitations period. Despite Yeager's efforts, at no time from 1962 to the present has there ever been a Board-conducted election. To prove majority and establish a Section 8(a)(5) violation, the Board impermissibly relied on events which supposedly occurred some 15 years prior to the hearing. It applied an irrebuttable presumption of Union majority status in 1979 based only on these prior events.

Bryan Manufacturing held that the otherwise lawful enforcement of an agreement within the Section 10(b) limitations period cannot be made unlawful by relying on stale evidence of a union's lack of majority status when the agreement was executed. Similarily, the question here is whether Yeager's otherwise lawful refusal to bargain with a minority union can be made unlawful by relying on evidence of the Union's alleged majority some 15 years earlier.

The Court's decision in *Bryan Manufacturing* does not turn on whether the pre-10(b) evidence itself amounts to an unfair labor practice. "[T]he entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed." 362 U.S. at 417. The policy considerations requiring exclusion of the pre-10(b) evidence in this case are precisely the same.

A. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS AND WITHIN THE NINTH CIRCUIT ITSELF.

The decision below conflicts with *NLRB v. Houston Maritime Association, Inc.*, 426 F.2d 584 (5th Cir. 1970). In *Houston Maritime*, the union maintained a racially discriminatory hiring hall by allowing only white persons to register for referral until September 3, 1963, at which time it adopted a policy of refusing all new applicants, black or

white. Black applicants who were denied referrals filed unfair labor practice charges on March 12, 1965. The previous discriminatory practices had not occurred within six months prior to that date. The Board nevertheless found a violation of the Act based on a theory that the unlawful discrimination had created an all white pool of workers within the Section 10(b) period which in itself constituted an unfair labor practice.

The Fifth Circuit disagreed. It reasoned that since an all white pool of workers during the limitations period was not, standing alone, illegal, the pool could not be infused with illegality by reliance on the pre-10(b) evidence. 426 F.2d at 588-89. Here, as in *Houston Maritime*, the Board sought to characterize a pool of workers within the Section 10(b) period based solely on events which occurred outside the limitations period. A majority of Yeager's 1979 pool of employees were presumed to desire Union representation because a different and much smaller pool of employees were thought to have desired the Union during 1964 to 1969.

In *NLRB v. Preston H. Haskell Co.*, 616 F.2d 136 (5th Cir.1980), the company untimely withdrew from multi-employer bargaining more than six months before an unfair labor practice charge was filed. The Board relied on this evidence to find that the company had unlawfully refused to apply the master labor agreement within the Section 10(b) limitations period. The Fifth Circuit reversed, ruling that the pre-10(b) evidence of untimely withdrawal from multi-employer bargaining could not be relied on to prove that the employer's conduct within the limitations period was unlawful. 616 F.2d at 141. The *Haskell* court specifically noted that Section 10(b) could not be avoided merely by failing to classify the pre-10(b) evidence as an unfair labor practice. In accordance with the policies underlying Section 10(b) as an exclusionary rule, the critical inquiry is whether the evidence itself should or should not be excluded. 616 F.2d at 141-42 n. 15.

The Court of Appeals' decision in this case is also in conflict with its earlier opinion in *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26 (9th Cir.), *cert. denied* 393 U.S. 914 (1968), thus calling for this Court to exercise its power of supervision. The court below distinguished *Bryan Manufacturing* from the present case by failing to characterize the pre-10(b) evidence of Union majority status as an unfair labor practice. In *MacMillan*, however, the same court held that the Board was precluded from relying on events which occurred prior to the Section 10(b) limitations period to establish bad faith bargaining within that period. The *MacMillan* court did not characterize the pre-10(b) evidence as an unfair labor practice. 394 F.2d at 32. Still, it found the policies recognized in *Bryan Manufacturing* were applicable. *Id.*

B. SUMMARY

Court review of this case is necessary to determine the breadth of the Section 10(b) limitations period as an exclusionary rule of evidence. Evidence excluded by the statute need not be limited only to facts which constitute an unfair labor practice. This Court in *Bryan Manufacturing* acknowledged the true policies underlying Section 10(b):

> The Board's ruling is further sought to be supported on the ground that it did not rest on a formal finding that the execution of the 1954 agreement constituted an unfair labor practice .... This distinction sacrifices the policy of the Act to procedural formalities. If, as is not disputable, the §10(b) limitation was prompted by 'complaint that people were being brought to book upon stale charges,' ... it is a particular *use* of the pre-limitations facts or conduct at which the section is aimed, and it can hardly be thought relevant that the proscribed use has not been labeled as such.

362 U.S. at 424-25 (citation omitted). The issue arises here because both the Board and the Ninth Circuit improperly applied the rule in *Bryan Manufacturing* to deny current employees their Section 7 right to choose whether or not to have the Union represent them.

Questions 2, 2a and 2b

II. THE IRREBUTTABLE PRESUMPTION APPLIED BY THE BOARD TO ESTABLISH UNION MAJORITY IN 1979 IS CONTRARY TO ESTABLISHED LAW.

A. DUE PROCESS OF LAW PROHIBITS THE BOARD FROM IMPOSING A CONCLUSIVE PRESUMPTION IN THIS CASE.

The Board retroactively applied an irrebuttable presumption of Union majority among Yeager's employees in 1979, a bargaining unit of over 38 persons, based on a purported showing of majority status among 3 to 6 employees during 1964 to 1969. This presumption spans a total of 15 years and would forever bar Yeager from contesting the Union's claim of majority status in the absence of an election. The result conflicts with numerous decisions of this Court and the Ninth Circuit.

The creation of an irrebuttable presumption is the creation of substantive law. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134-35 (1936); *NLRB v. Heyman*, 541 F.2d 796, 801 (9th Cir. 1976). A presumption is invalid where it is entirely arbitrary or operates to deprive a party of a reasonable opportunity to present pertinent facts in his defense. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 19 (1931). These rules apply with equal force to Board created presumptions. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945).

The irrebuttable presumption applied by the Board in this case is unreasonable and contrary to fundamental fairness. In all cases, it is

> essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.

Mobile, Jackson & Kansas City Railroad v. Turnipseed, 219 U.S. 35, 43 (1910).

The facts before this Court would establish, at best, that a majority of 3 to 6 unit employees in 1964 were Union members. From this, the Board leaped over the undisputed evidence to presume that a majority of nearly 40 current employees supported the Union as their bargaining representative in 1979. There is no rational connection between the facts proved and the facts presumed, and even less basis to conclude the facts inferred should be irrebuttably presumed.

Absent exceptional circumstances, an irrebuttable presumption of fact is unreasonable and contradicts well-established notions of procedural due process. In *Vlandis v. Kline*, 412 U.S. 441 (1973), for example, students who claimed Connecticut residence challenged the constitutionality of a statute which provided that, for purposes of determining tuition and fees, an unmarried student was presumed to be a nonresident if his legal address was outside of Connecticut at any time during the year preceding his application for admission. A married student was presumed to be a nonresident if his legal address was outside of Connecticut at the time he applied for admission. The Court held these conclusive presumptions violated the Due Process Clause because nonresident status was not "necessarily or universally true in fact" and the state had "reasonable alternative means of making the critical determination." 412 U.S. at 452. *See also Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *United States v. Provident Trust Co.*, 291 U.S. 272 (1934).

The Union's majority status which was irrebuttably presumed to exist in 1979 is not necessarily or universally true. It is, in fact, undisputed that the Union *lacked* majority support among Yeager's employees in 1979. In addition, there are far more reasonable alternatives available to the Board apart from placing blind reliance on the use of an irre-

buttable presumption. The Board could simply have allowed Yeager's employees to participate in an election or have applied a less onerous rebuttable presumption of Union majority. Due process of law requires at a minimum that Yeager and others like him be protected from retroactive findings of the Board which create bargaining obligations today based solely on events in the distant past.

B. THE NINTH CIRCUIT'S DECISION APPROVING THE BOARD'S APPLICATION OF AN IRREBUTTABLE PRESUMPTION CONFLICTS WITH ITS EARLIER DECISIONS.

In *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144 (9th Cir. 1981), the Ninth Circuit found that the Board had improperly applied an irrebuttable presumption of union majority during the term of a collective bargaining agreement because the majority, if any, was obtained pursuant to a union security clause. 642 F.2d at 1147. The court held that such a presumption was irrational and refused to find a violation. *Id.*

The application of an irrebuttable presumption of majority status in the present case is just as irrational. It defies logic to presume that 3 to 6 Union employees during 1964 to 1969 conclusively establishes that Union majority status existed among Yeager's employees in 1979. The only rational time for determining majority status is during the term of the disputed contract. *See Construction Erectors, Inc.*, 265 N.L.R.B. No. 95, p.5 n.11 (1982).

In *Pioneer Inn Associates v. NLRB*, 578 F.2d 835 (9th Cir. 1978), the court expressly held: "[A]pplication of contract bar principles does not make the presumption of majority status irrebuttable." 578 F.2d at 839; *accord, NLRB v. Rogers I.G.A., Inc.*, 605 F.2d 1164 (10th Cir. 1979). The employer in *Pioneer Inn* was permitted to rebut the presumption during the appropriate contract term. For reasons which were not explained by the court below, Yeager has been denied the right to rebut evidence of Union majority 15 years after the fact.

C. SUMMARY

Because of the far ranging impact of the decisions below on federal labor law, this Court should grant Yeager's petition for review in light of the cases holding such conclusive presumptions unconstitutional. The fundamental policy of the Act is to guarantee employees freedom in choosing whether or not they desire the Union as their representative. By applying an irrebuttable presumption of Union majority in this case, the Board has usurped the freedom of nearly 40 employees to participate in an election. The 3 to 6 employees who were Union members in 1964 may not dictate this choice in 1979.

The salutary notion of stabilizing existing bargaining relationships assumes a valid relationship. The addition of Section 8(f) to the Act recognizes the inherent instability of bargaining relationships in the construction industry. This recognition supports the overriding policy of the Act to provide employees freedom of choice. By applying a retroactive and irrebuttable presumption of Union majority in the present case, the Board does not serve any goal of stabilizing either current or pre-existing bargaining relationships.

An irrebuttable presumption is never appropriately applied in resolving a question concerning representation. It is a denial of due process to impose a bargaining obligation based on conclusively presumed facts which are contrary to the true evidence. Where the presumption is at total odds with the undisputed fact that a union lacks current majority status, the presumption is an intolerable interference with the employees' Section 7 right to decide whether they want the Union as their bargaining representative.

CONCLUSION

The limitations period provided by Section 10(b) of the Act excludes all evidence beyond the period which might be used to prove an unfair labor practice within that time. The Board and Ninth Circuit misread this Court's decision in

Bryan Manufacturing by finding that evidence of Union majority during 1964 to 1969 established a violation of the Act in 1979. This Court should re-examine and clarify the principles announced in *Bryan Manufacturing* in view of the conflict among circuits and within the Ninth Circuit itself regarding a proper application of Section 10(b).

Moreover, a determination of union majority status based on a conclusive presumption arising from events occurring 15 years prior to the charge and election petition presents questions of monumental impact to employers, employees, and unions in the construction industry. The findings of Union majority during 1964 to 1969, and applied in 1979, has effectively denied Yeager's current employees the right to an election. The irrebuttable presumption applied by the Board and Ninth Circuit in this case is so unreasonable as to violate due process of law as guaranteed by the United States Constitution. Yeager has never been given the opportunity to contest the Union's true lack of majority in 1979 through an evidentiary hearing before the Board.

This Court should issue a writ of certiorari to the United State Court of Appeals for the Ninth Circuit to review and reverse the decisions below.

RESPECTFULLY SUBMITTED this 24th day of July, 1984.

SHIMMEL, HILL, BISHOP & GRUENDER, P.C.

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Clarence R. Yeager Distributing, Inc.

Pursuant to Supreme Court Rule 28.1, Petitioner Clarence R. Yeager Distributing, Inc. is a wholly owned subsidiary of Yeager & Co., Inc.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARENCE R. YEAGER DISTRIBUTING, INC., Petitioner, -vs- NATIONAL LABOR RELATIONS BOARD, Respondent, and ARIZONA STATE DISTRICT COUNCIL OF CARPENTERS, Intervenor.	No. CA 82-7639 82-7756 MEMORANDUM

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board Argued and Submitted June 13, 1983

Before: Alarcon, Canby and Reinhardt, Circuit Judges

Clarence R. Yeager Distributing, Inc. ("Yeager") petitions for review of a decision of the National Labor Relations Board ("Board"). The Board cross-applies for enforcement of its order.

On October 15, 1979, Yeager initiated representation proceedings by filing an election petition with the Board. On October 26, 1979, the Union filed unfair labor practice charges and a complaint issued. After a hearing, the Regional Director dismissed Yeager's election petition. That decision was subsequently affirmed by the Board. Relying on the transcripts, exhibits and decisions in the representation proceedings, the Board subsequently granted the general counsel's motion for summary judgment in the unfair labor practice case. That decision is the subject of the [sic]

Yeager's petition for review and of the Board's cross-application before us. We deny Yeager's petition for review and enforce the Board's order.

FACTS:

Yeager has been primarily engaged in the sale, installation and service of overhead garage doors since at least the early 1960's. The company employs garage door installers, apprentice installers and servicemen. On September 11, 1962, the company president, Clarence Yeager, signed a memorandum agreement with the Union. That agreement incorporated by reference the terms of the area-wide master labor agreement ("MLA") effective June 1, 1962 to May 31, 1965. Thereafter Yeager executed memo agreements in 1966, 1971 and 1977. Each of those agreements incorporated subsequent MLA's by reference.

All of the agreements contained similar bargaining unit descriptions and set economic terms of employment for all covered employees. They all required the company to contribute to various trust funds on behalf of covered employees. Each agreement also contained exclusive, nondiscriminatory hiring hall referral provisions. None of the agreements contained a union security clause or differentiated between union and non-union employees.

Sometime after it signed the original 1962 memorandum agreement, the company began to apply the terms of the agreements only to employees who advised it of their union membership. The company paid an entirely different set of wages and benefits to employees who did not inform it that they were union members.

During the summer of 1979, Union representatives met several times with company officials to discuss the fact that the company was employing people who had not been referred out of the hiring hall. The company took the position that it had never entered into a binding contract with the Union and that it was not bound by a collective bargaining agreement. The company also informed the Union of its

practice of applying the terms of the collective bargaining agreement only to union members.

By letter dated October 4, 1979 the Union informed Yeager that its practice violated the parties' agreement and that the Union intended to enforce the agreement. Yeager treated that letter as a demand for recognition and filed an election petition with the Board.[1] The Union opposed that petition on the ground that Yeager was bound by the industry-wide MLA incorporated by the memorandum agreements. Yeager contended that it was not bound by the agreements, both because the contract was a voidable section 8(f), 29 U.S.C. § 158 (f), agreement, and because the parties intended the agreements to apply only to union members. In his decision of December 1979, reached after hearing, the Regional Director considered and rejected Yeager's arguments. The Regional Director found that the company was bound to the industry-wide collecting [sic] bargaining agreement by virtue of the company's execution of the successive memorandum agreements. That contract served to bar the company's election petition. The Board modified and affirmed the director's decision and dismissed the company's petition. The company's subsequent motion for reconsideration and to reopen the record was denied in December 1980.

The Board's decision granting the general counsel's motion for summary judgment on the unfair labor practice charge was filed in May 1982. The Board concluded that summary judgment was appropriate because the issues raised were or could have been litigated in the prior representation hearing. The Board held that the company had violated section 8(a)(5) and (1) of the Act by unilaterally changing existing terms of employment, repudiating the collective bargaining agreement, withdrawing recognition of the union

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[1] Yeager also filed an unfair labor practice charge against the Union at the same time that it filed its election petition. A complaint issued but the case was settled, over Yeager's objection. That matter is not before us, of course.

and refusing to apply the terms and conditions of the collective bargaining agreement to non-union members.

ANALYSIS

Summary judgment was not improper given the facts of this case. The general counsel's motion for summary judgment in the unfair labor practice case was granted after the company's representation case was decided. The issues which the company contends it should have been allowed to develop were or could have been litigated in the previous proceeding. Resolution of those issues did not turn on questions of witness credibility. [2] There was no reason to allow the company a second hearing on the same issues.

The company argues that despite the fact that its president signed all four agreements, the parties never intended to enter a true collective bargaining relationship. The contract terms did not limit their application to union members. The record indicates that over the years the Union made several successful attempts to enforce various contract provisions. In short, there was substantial evidence to support the Board's finding that the parties intended the agreements to be enforceable.

The Board properly concluded that the original section 8(f) pre-hire agreement was transformed into a section 9(a) contract during the 1964-69 period. *See Precision Striping, Inc. v. N.L.R.B.*, 642 F.2d 1144, 1147 (9th Cir. 1981) (majority support transforms pre-hire agreement into a collective bargaining agreement). In reaching that conclusion, the Board properly considered evidence of majority status in the contractually established unit of installers, servicemen and apprentices. The record indicates that, in contrast to those three groups, salesmen and ware-

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[2] Even if Mr. Yeager's testimony is fully credited, at most it raises the possibility that he misunderstood the terms of the contract. A unilateral mistake does not excuse contract performance unless the effect of the mistake is to make enforcement unconscionable or unless the other party had reason to know of the mistake. Restatement (Second) Contracts § 295 (a) and comment d (Tent. Draft No. 10, 1975).

housemen possess different skills and work under different conditions. The fact that work categories occasionally overlap is not dispositive. Even if a bargaining unit which included salesmen and/or warehousemen would have been appropriate, the company has failed to demonstrate that the Board's recognition of a smaller unit was abitrary or capricious. *See MPC Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 78 (2nd Cir. 1973).

The Board correctly limited its inquiry into majority status to the single employer unit. The Union's position as exclusive bargaining representative of the Yeager employees originated with majority support in the single employer unit. *Cf. N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965). The presumption of continuing majority status stems from that unit. *See N.L.R.B. v. Tahoe Nugget Inc.*, 584 F.2d 293, 302-304 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

There was substantial evidence to support the Board's finding of majority support in the single employer unit during the 1964-69 period. The Board properly relied on union membership to establish majority status. The employees in this case were not subject to a union security clause; union membership was entirely voluntary. *Cf. Precision Striping Inc. v. N.L.R.B.*, 642 F.2d 1144 (9th Cir. 1981).

The Board's reliance on events during the 1964-69 period did not violate the six month limitation period of section 10(b). In *Local Lodge No. 1424, International Ass'n. of Machinists v. N.L.R.B.*, 362 U.S. 411 (1960), the Supreme Court distinguished two types of situations arising under section 10(b). In some cases occurrences within the six month period in and of themselves "may constitute as a substantive matter, unfair labor practices." In such cases "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period. . . ." *Id.* at 416. "The second situation is that where conduct within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair la-

bor practice." *Id.* at 416-17. In that instance, evidence of the earlier infraction is barred. *Id. N.L.R.B. v. Tahoe Nugget Inc.*, 584 F.2d 293, 298 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

In this case the Board did not attempt to rely on stale unfair practice claims to support subsequent charges. The Board simply relied on evidence of past majority support to determine whether the parties were bound by a collective bargaining agreement. Having concluded that they were bound, the Board based its finding of unfair labor practices on occurrences within the six month period. This case therefore falls squarely within the first category described in *Bryan Manufacturing*.

The Union was not obliged to inform the company when majority status was achieved. The Board correctly applied the contract bar rule to prevent the company from challenging the Union's majority status during the term of the successive agreements. *Pacific Intercom Co.*, 255 N.L.R.B. 184 (1981), *enf'd*, 679 F.2d 900 (9th Cir. 1982); *Hexton Furniture Co.*, 111 N.L.R.B. 342 (1955). If the company believes the Union no longer enjoys majority support, it can take steps to obtain an election at the expiration of the contract term.

There is ample evidence to support the Board's finding that the Union did not know of the company's practice of limiting application of the collective bargaining agreement to union members.

The company's motion to reopen was properly denied. The evidence adduced at the representation hearing was extensive, and the affidavits submitted months later were inconclusive. Moreover, the evidence offered was neither newly discovered nor previously unavailable. The affiants had testified at the hearing.

There was substantial evidence to support the Board's finding that the company violated the Act by refusing to abide by the collective bargaining agreement within the six month period.

We have considered each of the company's remaining contentions and find them all lacking in merit.

We therefore deny Yeager's petition, and enforce the Board's order in its entirety.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARENCE R. YEAGER, DISTRIBUTING, INC., Appellant, -v- NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 82-7639 82-7756 ORDER

Before: Alarcon, Canby and Reinhardt, Circuit Judges:

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLARENCE R. YEAGER DISTRIBUTING, INC. and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ARIZONA STATE DISTRICT COUNCIL OF CARPENTERS AND ITS CONSTITUENT LOCALS: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 AND MILLWRIGHT LOCALS 1914 AND 1182. [1]	Case 28-CA-5578 261 NLRB 847

May 13, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND JENKINS

Upon a charge filed on October 26, 1979, by United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, herein collectively called the Union, and duly served on Clarence R. Yeager Distributing, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on January 30, 1981, [2] against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5), (3), and (1) and Section 2(6) and (7) of the National

[1] The name of the Union appears as corrected at the hearing in Case 28-RM-379.

[2] 17, 1981, the Regional Director for Region 28 issued an amendment to the complaint

Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent is now and has been at all material times a party to an agreement which provides for the recognition of the Union as the exclusive representative of certain of Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The complaint further alleges that Respondent violated Section 8(a)(5) and (1) by: (1) repudiating the current collective-bargaining agreement; (2) withdrawing recognition of the Union; and (3) unilaterally changing existing terms and conditions of employment of its employees in the appropriate unit by refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

The complaint also alleges that Respondent's acts and conduct described above violated Section 8(a)(3) and (1), as the acts discriminated in the hire and tenure and terms and conditions of employment of those employees of Respondent who were not union members, thereby discouraging membership in the Union.

Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 30, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 6, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

Relations Board has delegated its authority in this proceeding to a three-member panel. [3]

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent repeats the argument, first raised in the representation proceeding, that the 1979-82 contract to which Respondent agreed to be bound by signing memorandum agreements with the Union, [4] constitutes an unenforceable contract which cannot serve as a bar to the RM petition filed in Case 28-RM-379. Further, Respondent contends that the Regional Director erroneously found that the recognition clause of the 1979-82 contract sets forth an appropriate unit. [5] Respondent argues that substantial issues of fact warranting further hearing exist in this case. The General Counsel argues that all material issues have been previously presented to, and decided by, the Board, and that there are no litigable issues of fact requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including the record in Case 28-RM-379, discloses that the Regional Director for Region 28 issued his Decision and Order on February 12, 1980. In his decision, the Regional Director found Re-

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[3] Chairman Van de Water did not participate in the underlying representation case, 28-RM-379, and is participating here for institutional reasons.

[4] The most recent memorandum agreement was executed by Respondent and the Union under date of January 25, 1977.

[5] Official notice is taken of the record in the representation proceeding, Case 28-RM-379, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

spondent was bound by the 1979-82 collective-bargaining agreement negotiated by the Union and the Associated General Contractors, Arizona Chapter, Associated General Contractors of America, Inc., Arizona Building Chapter (herein Associations). Respondent, in 1977, had signed a memorandum agreement with the Union in which it agreed to be bound by collective-bargaining agreements between the Associations and the Union. Thus, the Regional Director concluded that a valid collective-bargaining agreement existed between Respondent and the Union and said agreement constituted a bar to the election petitioned for in Case 28-RM-379. In so doing, the Regional Director implicitly found that the unit set forth in the collective-bargaining agreement between the Union and the Associations constituted an appropriate unit. Further, in the underlying proceeding, Respondent acknowledged, and the Regional Director found, that Respondent only applied the economic terms of its collective-bargaining agreements to employees who indicated that they were union members. In regard to employees who did not affirmatively state they were union members, Respondent applied a different set of wages and benefits established by it without consultation with the Union. Finding the Union had persisted in its efforts to represent all employees, the Regional Director rejected Respondent's contention that the collective-bargaining agreement was a "members only" contract.

Thereafter, Respondent filed a request for review of the Regional Director's Decision and Order, and the Board, on April 22, 1980, granted the request for review. On September 24, 1980, the Board, with certain modifications, affirmed the Regional Director's Decision and Order and dismissed the petition filed in Case 28-RM-379. On October 6, 1980, Respondent filed a motion for reconsideration and to reopen the record, which was denied by the Board on December 17, 1980.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a

respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. [6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment. [7]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, an Arizona corporation with an office and place of business in Phoenix and Tucson, Arizona, where it is presently, and has been at all times material herein, engaged in the business of nonretail sale and installation of garage doors. In the course and conduct of its business operations, Respondent purchases and receives goods and materials valued in excess of $50,000 directly from firms located outside of the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6)

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[6] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] Inasmuch as the remedy would not be affected by a finding that Respondent's conduct violated Sec. 8(a)(3) as well as 8(a)(5), there is no need to address the General Counsel's allegation that it did. *V M Construction Co., Inc.*, 241 NLRB 584, 587 (1979).

and (7) of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Unit*

Commencing in September 1962, Respondent executed a series of memorandum agreements with the Union providing, *inter alia*, that Respondent would be bound by existing and subsequently negotiated collective-bargaining agreements between the Union and the Associations. The current 1979-82 agreement provides, *inter alia*, for the recognition of the Union as the exclusive collective-bargaining representative of Respondent's installers, servicemen, and apprentice employees in a unit of employees described in the following manner:

> That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

The unit of employees described above constitutes a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

B. *The Representative Status of the Union*

The Union is now, and has been at all material times, the exclusive, representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

C. *The Violations*

Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described above, has repudiated the collective-bargaining process, and has unilaterally withdrawn recognition of the Union by refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds. Further, Respondent has failed and refused to apply the terms and conditions of the collective-bargaining agreement to nonmembers of the Union.

Accordingly, we find that, by the aforesaid conduct, Respondent has failed and refused, and is now failing and refusing, to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. By such conduct, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it

cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Such affirmative action shall include that Respondent recognize and deal with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit by honoring the collective-bargaining agreement, terms of which run from June 1, 1979, to May 31, 1982, in all its terms.

Additionally, we have found that Respondent has made unilateral changes in certain terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make whole its employees by making the required fringe benefit contributions [8] and paying the wage rates as set forth in the collective-bargaining agreement, plus interest, that it has failed to pay since April 27, 1979, as prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977).[9] We shall also order Respondent to comply with the hiring hall provisions of the collective-bargaining agreement [10] and submit the necessary forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

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[8] Fringe benefit contributions shall be computed in the manner set forth in *Merryweather Optical Company,* 240 NLRB 1213 (1979).

[9] See *Ogle Protection Service, Inc., and James J. Ogle,* 183 NLRB 682 (1970). See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[10] If there are employees who were denied an opportunity to work for Respondent because of the latter's refusal to abide by its collective-bargaining agreement with the Union, the make-whole order herein shall encompass them. A determination as to whether or not such employees exists is best left to the compliance stage of this proceeding. *Wayne Electric, Inc.,* 226 NLRB 409 (1976).

CONCLUSIONS OF LAW

1. Clarence Yeager Distributing, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent at all material times has been, and is now, signatory to an agreement providing, *inter alia*, that Respondent would be bound by existing and subsequently negotiated collective-bargaining agreements between the Union and the Associations.

The current 1979-82 agreement provides, *inter alia*, for the recognition by Respondent of the Union as the exclusive collective-bargaining representative of Respondent's installers, servicemen, and apprentice employees in a unit of employees appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act. The agreement describes the unit in the following manner:

> That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

4. At all times material herein, the above-named labor organization has been and now is the exclusive

representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally failing and refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Clarence R. Yeager Distributing, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, as the exclusive bargaining representative of its employees in the following appropriate unit:

> Respondent's installers, servicemen, and apprentice employees in a unit of employees described in the following manner:
>
> That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and

Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

(b) Failing and refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Recognize and bargain upon request with the Unions as the exclusive representative of its employees in the aforesaid appropriate unit and honor and abide by the collective-bargaining agreement, terms of which run from June 1, 1979, to May 31, 1982, in all its terms, including the hiring hall provisions.

(b) Make whole its employees, in the manner set forth in the section of this Decision entitled "The Remedy," by making the required fringe benefit contributions and by paying to employees wage rates, with interest, all as required by its collective-bargaining agreement with the Union, that it has failed to pay since April 27, 1979.

(c) Submit the necessary forms to the Arizona health, welfare, pension, vacation, and apprenticeship fund.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to

analyze the amount of money due under the terms of this Order.

(e) Post at its Phoenix and Tucson, Arizona, places of business copies of the attached notice marked "Appendix." [11] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1060, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, as the exclusive representative of our employees in the following appropriate unit:

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[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Employer's installers, servicemen, and apprentice employees in a unit of employees described in the following manner:

That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

WE WILL NOT unilaterally change existing terms and conditions of employment of our employees in the above-described unit by failing and refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain upon request with the Union as the exclusive representative of our employees in the above-described unit and honor the collective-bargaining agreement, terms of which run from June 1, 1979, to May 31, 1982, in all its terms, including the hiring hall provisions.

WE WILL make whole our employees by making the required fringe benefit contributions and by paying to employees wage rates, with interest, all as required by our collective-bargaining agreement with the Union, which we have failed to pay since April 27, 1979.

WE WILL submit the necessary forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

CLARENCE YEAGER DISTRIBUTING, INC.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLARENCE R. YEAGER DISTRIBUTING, INC. Employer-Petitioner and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ARIZONA STATE DISTRICT COUNCIL OF CARPENTERS AND ITS CONSTITUENT LOCALS: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 AND MILLWRIGHT LOCALS 1914 AND 1182 Union	Case 28-RM-379

By telegraphic order dated April 22, 1980, the Employer-Petitioner's request for review was granted. Having duly considered the entire record, including the Employer's request for review and the parties briefs, the Board has decided to, and hereby does, affirm the Regional Director's Decision and Order as modified herein.

While the Regional Director finds, "Inter Alia", that the current 1979-82 agreement is not a voidable 8 (f) agreement but constitutes a bar to the petition herein because the Union represented a majority of the Employer's employees during the years 1964 and 1969, and during the last calendar quarter of 1971, we find it necessary to rely only on the showing of majority status for the period from 1964-69.

Since we agree with the Regional Director that the 1979-82 agreement is not a voidable section 8 (f) agreement because the union achieved majority status among the Employer's own employees in a permanent and stable unit of installers, servicemen, and apprentices, we find it

unnecessary to determine whether the Employer became a member of the multi-employer bargaining unit.

Finally, since we agree with the Regional Director that if the rule of expanding unit in "General Extrusion Company, Inc.," 121 NLRB 1165, applies here, it is satisfied, we do not find it necessary to reach the issue of whether the rule "should" apply and thus we do not adopt the Regional Director's analysis on this point.

Accordingly, the petition filed herein is hereby dismissed.

Dated, Washington, D.C., September 24, 1980, John H. Fanning, Chairman, Howard Jenkins, Member, John A. Penello, Member.

Howard Jenkins NLRB Washington DC 20570.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

CLARENCE R. YEAGER DISTRIBUTING, INC. Employer-Petitioner and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ARIZONA STATE DISTRICT COUNCIL OF CARPENTERS AND ITS CONSTITUENT LOCALS: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 AND MILLWRIGHT LOCALS 1914 AND 1182 Union [1]	Case 28-RM-379

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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[1] The name of the Union appears as corrected at the hearing. The parties stipulated that the Union is a labor organization within the meaning of the Act. The Union came about as a result of a merger in 1979 of the Central Arizona District Council of Carpenters and the Southeastern Arizona District Council of Carpenters. There is no claim or contention that the composition or identity of the Union changed as a result of this merger which simply consolidated into one state district council the two former area district councils.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claim(s) to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Employer seeks an election in a unit, as amended, at the hearing, consisting of warehousemen, servicemen, installers, salesmen and helpers employed at its facilities in Phoenix and Tucson, Arizona.[2] The Union contends that the Employer is bound by the terms of a collective bargaining agreement with the Union whose term runs from June 1, 1979, to May 31, 1982, that such contract stands as a bar to the conduct of an election at this time, and that the petition should be dismissed. The Union further contends that the contract's coverage is limited to the classifications of installer, serviceman and apprentice, which the Union contends comprise the historically recognized bargaining unit. The Employer contends for a number of reasons that the contract does not bar an election.

The Employer, an Arizona corporation, is engaged primarily in the sale, installation and service of overhead garage doors in both residential and commercial construction. It maintains two facilities, one in Phoenix and one in Tucson, Arizona, out of which it conducts its primary operations. The facility in Phoenix is the larger of the two and houses the sales, warehousing and office areas. A similar arrangement, although on a smaller scale, is found in the Tucson facility. In addition, the Employer maintains a sepa-

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[2] At the hearing, the classification of helper was used interchangeably with the classification of apprentice.

rate shop in Phoenix at an address removed from the main sales, warehouse and office facility. The employees at the shop manufacture customized doors and perform certain plaqueing work on doors. The employees in the shop are covered by a collective-bargaining agreement negotiated on behalf of the Employer by the Associated General Contractors with the United Brotherhood of Carpenters and Joiners of America, Local 2093. Neither party contends that the shop employees should be part of any unit deemed appropriate in the Employer's sales, installation and service operations. The Employer's Phoenix and Tucson warehouse employees work in and at their respective facilities and are primarily engaged in receiving and unloading incoming materials. They then store the materials in the warehouse area. The Phoenix and Tucson installers, servicemen and apprentices, on the other hand, work at various field construction projects, residential or commercial, installing and servicing the Employer's product.

Under date of January 25, 1977, Clarence R. Yeager, the Employer's president and chief executive officer, signed a memorandum agreement with the Union in which it was agreed, in part, that the Employer would be bound by, and comply with, all the terms of the collective-bargaining agreement dated August 1, 1976, between the Associated General Contractors, Arizona Chapter, Associated General Contractors of America, Inc., Arizona Building Chapter (herein called the Associations), and the Union. By terms of the memorandum agreement, the Employer agreed further to be bound by any amendments, extensions or renewals of the 1976 agreement. The memorandum agreement provided, in part, that:

> the undersigned employer shall comply with and be bound by all the terms of such successor agreement, and to all amendments, extensions and renewals thereof, without regard to whether the undersigned employer does or does not participate directly or indirectly in said negotiations, unless prior to the commencement of such negotiations the undersigned employer gives actual and

> timely notice in writing to the unions that it is withdrawing from the multi-employer bargaining unit and that it desires separate bargaining on an individual basis. Likewise unless such a timely notice is given, the undersigned employer shall comply with and be bound by all such successor multi-employer agreements and by the amendments, extensions and renewals thereof, negotiated hereafter from time to time for successive terms of years by said unions with some or all of the above named associations or their successors. All such successor agreements and their amendments, extensions and renewals shall be deemed to be incorporated herein by reference at such time as they are negotiated and become effective by their terms.

The memorandum agreement also provides that the signatory employer becomes a member of the overall multi-employer bargaining unit consisting of the individual contractors who are members of the associations and all of those independent contractors such as the employer who have agreed to comply with and be bound by all the terms of the multi-employer agreement.

The Employer has been in business since at least the early 1960's. In September of 1962, the Employer executed the first of a series of memorandum agreements similar in form to the one it executed in 1977. Over the years, two other memorandum agreements have been entered into by the Employer, one in 1966 and one in 1971. Association-Union bargaining agreements were negotiated and concluded in 1965, 1970, 1973, 1976, and 1979. By reason of the execution of the several memorandum agreements over the years, the Employer has bound itself to the above contracts so negotiated between the Associations and the Union. At no time has the Employer ever given timely notice that it no longer desires to be bound by the multi-employer collective bargaining agreement. All of the collective-bargaining agreements have contained exclusive nondiscriminatory hiring hall referral provisions and economic terms, including wages, and have required contributions to various trust

funds set up under the collective-bargaining agreements. Since Arizona state law prohibits union security agreements, no union security clauses have been included in any of the collective-bargaining agreements.

After each new collective-bargaining agreement has been negotiated, the Employer has been notified by the Union as to any changes in wage rates and required contributions to the various trust funds. The Employer has abided by the new economic terms as conveyed to it by the Union.

Clarence R. Yeager testified that he signed the memorandum agreements on the assurance from various union representatives that in order for him to employ union employees it was necessary for him to sign the agreements. He further testified that he only applied the economic terms of the successive collective-bargaining agreements to employees who indicated that they were union members. With regard to employees who did not affirmatively state that they were union members, the Employer devised and applied a different set of wages and benefits established by it independently of any consultation or bargaining with the Union. There is no evidence that Yeager specifically informed the Union, or any of its representatives, that the Employer was limiting application of the collective-bargaining agreements to only union members. Nor is there evidence that the Union, or any of its representatives, agreed to such a practice, or knew, based upon any other objective evidence, that such an arrangement existed.

Nonetheless, the Employer contends that its unilateral attempt to operate in a "members only" manner in application of the various collective-bargaining agreements renders them inoperative as bars to an election. The Employer further argues that the Union acquiesced in the application of the terms of the collective-bargaining agreements to "members only." In this regard the Employer presented testimony that on various occasions over the years it had secured employees without going through the Union's hiring hall, all with the Union's alleged knowledge. However,

there is no record evidence to establish, especially given the fact that Arizona is a right-to-work state and the nondiscriminatory application of the contractual referral procedures, that union members could only be secured through the hiring hall. More importantly, as regards the asserted "members only" application of the contract, there is no record evidence upon which to conclude that the mere fact employees were occasionally obtained from sources other than the hiring hall was equivalent to the Employer's not applying the terms of the existing contract to those nonreferred employees and/or the Union's knowledge of such a practice.

The Union correctly argues that the 1979-1982 agreement and all predecessor agreements apply to all employees employed under the terms of the agreements and on their face do not differentiate between union members and nonunion employees. It further argues that it has attempted to have the Employer comply with all of the terms of the agreement for all of the Employer's employees. The evidence is clear that the Union took steps to rectify any and all noncompliance with the hiring hall referral provisions when it obtained information that the Employer was in fact not complying with those provisions. The Union went so far as to threaten to picket a construction project on which the Employer was working in Tucson in 1978 when it learned that employees employed by the Employer on that project had not been referred from the Union's hiring hall as required by the collective-bargaining agreement. At that time, and at all other times, when the Employer was put on notice that it was in noncompliance, the Employer took steps to affirmatively comply with the collective-bargaining agreement then in effect which included the Employer's seeking proper referrals from the hiring hall and contributing the contractually required fringe benefit payment for all employees so referred. It appears that the Union began its policing of the collective-bargaining agreement it had with the Employer some time in 1969 when the Employer undertook a large job at Sun City, Arizona. Prior to that time, the

Employer from the start of its relationship with the Union, employed only a small number of unit employees most of whom were union members and for whom the Employer applied all the terms of the then current collective-bargaining agreement.

In support of its argument that the arrangement with the Union was a "members only" contract which would not serve as a bar to an election on its present petition, the Employer cited a number of cases. I find those cases to be inapposite to the situation before me, and they do not provide a basis for the conclusion that the collective-bargaining agreement asserted as a bar is a "members only" contract. Thus, in *Cargo Packers, Incorporated,* 109 NLRB 1184 (1954), and *Shorr Stern Food Corp.,* 227 NLRB 1650 (1977), the Board found that the union had withdrawn representation from a substantial number of employees in the collective-bargaining unit covered by the contract urged as a bar. Such is not the case in the instant matter where the evidence reflects that the Union is, and has been at all times, persisting in its efforts to represent all of the employees employed in the collective-bargaining unit covered by the contract between it and the Employer. The same is likewise true for *N. Summergrade & Sons,* 121 NLRB 667 (1958), in which the Board found that the intervenor there had never in fact represented all the employees equally without discrimination between union and nonunion members. The Board noted that the intervenor in that case made no attempt to require the Employer to make welfare fund payments for all employees covered by the contract. The evidence in the instant case is to the contrary, in that the Union has, at all times, attempted to have the Employer apply all the terms of the agreement to employees working in installer, serviceman, and apprentice classifications. Therefore, it appears that the Employer has unilaterally attempted to differentiate between union and nonunion employees without the Union's knowledge or acquiescence.

I find that the 1979-1982 collective-bargaining agreement is not a "members only" contract which would remove it as a bar to this proceeding.

The Employer further urges that the current 1979-82 agreement cannot serve as a bar because it is based upon a relationship established pursuant to the provisions of Section 8(f) of the Act. Section 8(f) of the Act provides that the employers and unions engaged primarily in the building and construction industry may enter into so-called prehire agreements at a time when the union-signatory has not been designated or selected by a majority of the employer-signatory's employees as their collective-bargaining representative.[3] Section 8(f) provides further that such an agreement, entered into when majority status of the union has not been established under provisions of Section 9 of the Act prior to the making of such an agreement, will not be a bar to a petition filed pursuant to Section 9(c) or 9(e) of the Act. There has been no showing made in this case that at the time of the Employer's execution of the first memorandum agreement in September of 1962, that the Union had been designated or selected by a majority of the Employer's employees in the contract unit pursuant to Section 9(a) of the Act. In order for the 1979-1982 collective-bargaining agreement to serve as a bar to the petition in this case, it must be shown that, during the course of the 17-year relationship between the Union and the Employer, the Union acquired majority status, since successive and presumably Section 8(f) agreements standing by themselves do not establish a presumption of majority.

Although payroll records were not available, it was established by testimony of Clarence R. Yeager and long time employees of the Employer that between 1964 and 1969, the Employer employed a relatively small and stable complement of employees. It appears that the Employer had

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[3] The parties do not dispute that the Employer is primarily engaged in the building and construction industry as that term has been defined by the Board.

in his employ during that period of time only 3 to 6 employees. The evidence, both testimonial and documentary, establishes that throughout that five year period, most, if not all, of those employees were union members in good standing. Therefore, I conclude, based upon the entire record, that the Union did in fact represent a majority of the Employer's employees covered by the then current collective-bargaining agreements during the years 1964 to 1969.

A finding of majority status can also be made with respect to the Employer's employees working during the last calendar quarter of 1971.

As designated by the Employer there were 13 employees during that calendar quarter who performed the bargaining unit duties and functions of installers, servicemen and apprentices. [4] Of the 13 so indicated, 7 were union members for whom the Employer contributed the required amounts to the trust funds under the then existing collective-bargaining agreement. [5] Actual union membership of a majority of unit employees has been utilized as proof of support as a Section 9(a) representative. *Haberman Construction Co.*, 236 NLRB

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[4] I find the Employer's argument that its warehousemen and salesmen should be included in the unit for purposes of determining majority status to be without merit. Quite apart from the record evidence which establishes the absence of any community of interest between these categories and the installers, servicemen and apprentices based upon differences in work locations, skills, and wages, it is clear from the uncontroverted testimony of Union business officials, as corroborated by the Employer's own management witnesses, that neither the language of the collective bargaining agreement nor the historical practice has ever been intended to encompass the Employer's warehousemen and salesmen within the contractually established appropriate bargaining unit of installers, servicemen and apprentices. Indeed, it appears that it was not until the instant proceeding that the Employer, by amendment of its initial petition, sought the inclusion of salesmen in the unit.

[5] The December 1971 trust report for the 7 union members indicates that the hours worked during the month would reasonably require work in some or all of all of the weeks in that month. The Employer's argument that the majority analysis cannot be made based upon the records in evidence is therefore rejected.

No. 7 (1978); *V. M. Construction Co., Inc.*, 241 NLRB No. 84 (1979). Based on the above, I find that the Union did represent a majority of the Employer's installers, servicemen and apprentices at all times material herein. Thereafter, an irrebuttable presumption of majority status flowed from the successive Union-Association contracts during the terms of those successive agreements. Therefore, the majority status, which was enjoyed by the Union, gives rise to a presumption of continued majority status which cannot be questioned during the term of the current 1979-1982 contract. That agreement is not a Section 8(f) contract since the parties' bargaining history has long since converted into a Section 9(a) collective bargaining relationship. Accordingly, the Board's Decision in *Dee Cee Floor Covering, Inc.*, 232 NLRB 421 (1977) does not apply herein.

The Employer also contends that the contract asserted as a bar by the Union cannot serve as a bar because it is of indefinite duration. This argument erroneously assumes that it is the memorandum agreement of January 25, 1977, that is being urged as a bar. On the contrary, the Union is urging that the Association-Union agreement for the 1979-1982 period, to which the Employer is bound by the terms of the memorandum agreement, is the one that constitutes the bar. It is clear that the 1979-1982 agreement is for a definite duration and therefore the Employer's argument fails. *Ted Hicks and Associates, Inc.*, 232 NLRB 712 at fn. 5 (1977). Similarly, the Employer argues that it would be unjust to bind it to the terms of the 1979-1982 agreement, since it did not receive notice of the termination of the 1976-1979 agreement and notice that the Union desired to negotiate a successor agreement. The terms of the 1976-1979 agreement do not require any notice to individual signers of memorandum agreements. All that is required is that the Union notify the Association of its intent to terminate, modify or amend the agreement at least 60 days prior to May 31, 1979. By itself failing to give notice to the Union prior to a commencement of negotiations for the 1979-1982 agreement that it desired to negotiate an individual agreement, the Em-

ployer became bound by the successor agreement negotiated between the Union and the Association. *Ted Hicks and Associates, Inc., supra,* enfd. 512 F.2d 1024 (C.A. 5, 1978). In response to a similar argument, the Court in the *Hicks* case stated as follows:

> In the alternative, Hicks contends that the 1974 contract is still in effect because it received no notice that the Union wanted to renegotiate this contract. Although Hicks did not receive notice, the Union complied with the requirements of the 1974 contract in notifying the AGC. More importantly, the memorandum agreement does not stipulate that the Union must notify Hicks if it seeks to alter the 1969 contract. Cf. *NLRB* v. *R. J. Smith Construction Co.,* supra, 545 F.2d at 192 (employer did not comply with termination provisions of prehire memorandum agreements). The memorandum in this case requires only that the Union and Hicks adhere to modifications of the 1969 agreement, which is what the Union did in notifying the AGC.

Additionally, the Employer urges that the rule of expanding unit as found in *General Extrusion Company, Inc.,* 121 NLRB 1165, should be applied to this case. In *General Extrusion* the Board decided that a contract executed at a time when an employer has in its employ less than 30 percent of the complement employed at the time of the hearing, and less than 50 percent of the job classifications in existence at the time of the hearing, would not bar an election. The thrust of the rule was to eliminate contract bar issues based upon whether operations had begun or had assumed normal proportions at the time the contract was entered into. In the present situation, the growth of the Employer's work force from 1977 to 1979 seems to have come about as a result of normal growth and development of the Employer's business. The stability of the work force had not changed from 1977 to 1979. A gauge of the work force indicates that "normal proportions" had been reached in 1977. It also appears that the Board has questioned the

application of the *General Extrusion* rule to the building and construction industry. Specifically, it is doubtful that such a rule would apply to this Employer and its eighteen year operations spanning five consecutive collective bargaining agreements. *Clement-Blythe Companies,* 182 NLRB 502 (1970). I do not find that the present case is the type that was envisioned by the Board when it adopted the *General Extrusion* rule. In any event, accepting the Employer's figures, it appears that more than 30 percent of the employee complement at the time of the hearing was employed in January of 1977, and of course, the same job classifications that existed in January of 1977 existed at the time of the hearing. I find that the 1979-1982 agreement is not removed as a bar by any reason of the growth of the Employer's work force.

In the case before me, the Employer did not give timely notice pursuant to the memorandum agreement and the 1976-79 agreement, and, therefore, it is bound by the 1979-1982 agreement which constitutes a bar to the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 25, 1980.

Dated at Phoenix, Arizona, this 12th day of February 1980.

Milo V. Price, Regional Director
National Labor Relations Board
Region 28

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLARENCE R. YEAGER DISTRIBUTING, INC. Employer-Petitioner and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ARIZONA STATE DISTRICT COUNCIL OF CARPENTERS AND ITS CONSTITUENT LOCALS: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 AND MILLWRIGHT LOCALS 1914 AND 1182 Union	Case 28-RM-379

ORDER DENYING MOTION

By Telegraphic Order dated September 24, 1980, the National Labor Relations Board affirmed the Regional Director's Decision and Order with certain modifications and dismissed the petition filed herein.

Thereafter, on October 6, 1980, the Employer-Petitioner filed a Motion for Reconsideration/Motion to Reopen Record. The Employer-Petitioner moves the Board for reconsideration of its findings and of its affirmation of the Regional Director's unit determination, and moves that the record be reopened. The Employer-Petitioner submits that if the motion to reopen record is granted, it would seek to adduce further testimony from Messrs. Coleman, Johnson and Fornear with respect to the Union's acquiescence to the members-only arrangement. Affidavits were submitted in support thereof. On October 14, 1980, the Union filed a response in opposition.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Employer-Petitioner's motions be, and they hereby are, denied as lacking in merit.

Dated, Washington, D. C., December 17, 1980.

By direction of the Board:

Robert Volger

Acting Executive Secretary

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE R. YEAGER DISTRIBUTING, INC., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent, ARIZONA STATE DISTRICT COUNCIL OF CARPENTERS, Intervenors.	No. 82-7639, NLRB# 261-NLRB-108 JUDGMENT Phoenix, Arizona

Upon Application for Enforcement of an Order of the National Labor Relations Board

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board June 13, 1983 and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the application for enforcement of the order of the National Labor Relations Board in this Cause be, and hereby is ENFORCED.

Filed and entered: September 26, 1983.

APPENDIX H

Relevant portions of Subchapter II of the National Labor Relations Act of July 5, 1935, 49 Stat. 452, 29 U.S.C. §§ 157, 158(a)(1), (a)(3), (a)(5), (b)(1)(A), (b)(2), (d), (f), 159, and 160(b), as amended.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the

beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

• • •

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of

subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory

where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)—(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in a particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days'

notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

• • •

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the

final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

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§ 159. Representatives and elections

Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in

the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the

Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the

enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Secret ballot; limitation of elections

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

§ 160. Prevention of unfair labor practices

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Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and

the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

U.S. CONST. amend. V:

No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

APPENDIX I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ARIZONA STATE DISTRICT COUNCIL OF CARPENTERS and CLARENCE R. YEAGER DISTRIBUTING, INC.	Case 28-CB-1546

COMPLAINT AND NOTICE OF HEARING

It having been charged by Clarence R. Yeager Distributing, Inc. (hereinafter called Yeager), that Central Arizona District Council of Carpenters (correctly designated in the caption hereof as United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters, and hereinafter called the Respondent) has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act), the Acting General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge was filed by Yeager on October 15, 1979, and a copy thereof was duly served upon the Respondent by registered mail on the same date.

2. Yeager is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Arizona.

3. At all times material herein, Yeager has maintained its principal office and place of business at 1618 East Jackson Street, Phoenix, Arizona, and an office and place of business at 1942 West Price Street, Tucson, Arizona, where it is primarily engaged in the nonretail sale and installation of garage doors.

4. During the past 12-month period, which period is representative of Yeager's operations generally, Yeager purchased goods and materials valued in excess of $50,000, which were transported in interstate commerce and delivered to its operations in the State of Arizona directly from suppliers located in states of the United States other than the State of Arizona.

5. Yeager is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

7. At all times material herein, the following-named persons occupied the positions set forth opposite their respective names and have been, and are now, agents of the Respondent within the meaning of Section 2(13) of the Act:

John F. Greene — Secretary-Treasurer
Richard Mills — Business Agent

8. In or about late August 1979, and on or about October 11, 1979, the Respondent demanded that Yeager discharge all of its nonunion employees.

9. In or about September 1979, on a date not more specifically known to the undersigned, the Respondent, by Richard Mills, during a telephone conversation, informed an employee that if he resigned from the Respondent he would lose his job.

10. By the acts and conduct described above in paragraph 8, and by each of said acts and conduct, the Respondent has caused or attempted to cause, and is continuing to cause or

attempt to cause, Yeager to discriminate against its employees in violation of Section 8(a)(3) of the Act, and thereby has engaged in, and is continuing to engage in, unfair labor practices within the meaning of Section 8(b)(2) of the Act.

11. By the acts and conduct described above in paragraphs 8 through 10, and by each of said acts and conduct, the Respondent has restrained and coerced, and is continuing to restrain and coerce, employees in the exercise of their rights guaranteed in Section 7 of the Act, and thereby has engaged in, and is continuing to engage in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

12. The activities of the Respondent described above in paragraphs 8 through 11, occurring in connection with the operations of Yeager described above in paragraphs 2 through 5, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The acts and conduct of the Respondent described above constitute unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, which affect commerce within the meaning of Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that commencing at 9 a.m. (MST), on the 10th day of April 1980, and consecutive days thereafter, a hearing will be conducted in Hearing Room A, 2nd Floor, 3030 North Central Avenue, Phoenix, Arizona, before a duly designated administrative law judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are also notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to

said complaint within 10 days from the service thereof, and that, unless it does so, all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board. You are also notified that, pursuant to said Rules and Regulations, the Respondent shall serve a copy of its answer on each of the other parties.

Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

Dated at Phoenix, Arizona, this 21st day of November 1979.

Milo V. Price, Regional Director
National Labor Relations Board
Region 28

Attachment

APPENDIX J

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

April 22, 1980

Re: United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters (Clarence R. Yeager Distributing, Inc.)
Case No. 28-CB-1546

Philip M. Prince, Esquire
Shimmel, Hill, Bishop
and Gruender, P.C.
10th Floor
111 West Monroe
Phoenix, Arizona 85003

Dear Mr. Prince:

Your appeal from the Regional Director's approval of an informal settlement agreement in the captioned case has been duly considered.

The appeal is denied. It was determined that the Charging Party has not been harmed by the settlement agreement since it does not preclude the Charging Party from arguing before an administrative law judge that the Union's alleged coercion of employees in some way exonerates the Employer's action. Additionally, it is well established that the inclusion in a settlement agreement of a nonadmission clause is not a valid basis for objection where the settlement effectuates the policies of the Act. *United Mine Workers of America (James Bros. Coal Co.)*, 191 NLRB 209 (1971).

Accordingly, it was determined that further proceedings herein are unwarranted.

Very truly yours,

William A. Lubbers
General Counsel

By /s/ RONALD M. SLATKIN
Ronald M. Slatkin
Acting Director
Office of Appeals

cc: Director, Region 28

cc: Clarence R. Yeager Distributing, Inc., 1618 East Jackson Street, Phoenix, Arizona 85034

Arizona State Council of Carpenters, 1841 North 24th Street, Phoenix, Arizona 85008

Michael J. Keenan, Esquire, 316 W. McDowell Road, Phoenix, Arizona 85003

APPENDIX K

AFFIDAVIT

State of Arizona }
} ss.
County of Maricopa }

NOW COMES John Owen Briggs, and being duly sworn, deposes and says:

1. I am currently employed by Clarence R. Yeager Distributors, Inc., as residential installation and service supervisor. I first came to work for Yeager in November of 1962 as an apprentice installer. I have held my current position for approximately the last year and one half. I terminated my employment with Yeager in 1972 and was rehired in 1978. When I left in 1972, I was a foreman for Yeager at its work in Sun City, Az.

2. When I testified at the hearing at the NLRB last December, the union's attorney showed me some union trust fund records covering a period approximately eleven to fifteen years ago and asked me if I could recall the names of other employees than those listed on the reports. I was taken off guard and was unable to recall any other names at that time. However, when Yeager's attorney questioned me, I made it clear that there could have been other employees who did installation and repair work whose names I could not then remember.

3. Since we were working at Sun City during the period in question, it is impossible that we would have only used three to six employees due to the size of that job. I have had a chance to speak with some of my colleagues and can now remember that the following employees, who were not on those trust reports and were not union members, worked for Yeager on a regular basis during the period from 1964-69: Hank Smith, George Curtis, Jimmy Yeager, Ralph Dalia (who are now in management but did installation then as regular employees) Ed Bowers, George Knoecht, Ed Campbell, Herbert McKeever (who I can now clearly recall because

he had no teeth), Art Adolf and Ken Ballard. During this period, I worked with each of these individuals doing installation work.

4. I have also had a chance to review the trust reports that the union attorney showed me. Many of the names on those reports, such as Waggener, Morris, Gulinas, were just temporary employees who were with us for very short periods of time to help us over extremely busy weeks. The employees that I named in 3, above, were not temporary employees but were regular, full-time employees.

I have read the above statement of 4 pages and it is true and correct to the best of my knowledge.

/s/ JOHN OWEN BRIGGS

Subscribed and sworn to before me this 1st day of October, 1980.

/s/ RANDYE MITRANI
Notary Public

My Commission Expires: 9/25/83

APPENDIX L

AFFIDAVIT

State of Arizona }
} ss.
County of Maricopa }

NOW COMES, James R. Yeager, and being duly sworn, deposes and says:

1. I am currently employed by Clarence R. Yeager Distributor, Inc., as Vice-President/Manager. I started my employment with Yeager in 1962. When I first came to work for Yeager, I performed installation and service work. I have held my current position since August of 1971.

2. From 1964 to 1969, we employed numerous employees. I have been asked to attempt to recall the names of as many of those employees as possible. While it is extremely difficult to do this because we do not have payroll records covering that period, I can recall that the following workers were with us and whom I worked with at that time:

Art Adolph who was knowledgable in construction, had formerly worked for Cox Construction.

Ken Ballard came originally from Mississippi and his brother was killed in an auto accident.

Ed Hamilton was a hard working black man who lived on Jefferson St. and worked at Yeagers off and on for years.

Ed Bowers always sang hymns at Christmas parties.

Ralph Dalia related by marriage.

Hank Smith took company vehicle hunting and tore rear end out in mountains near Prescott.

George Curtis, a witty, fair-skinned person who got a severe sunburn while installing doors in Tucson.

George Knecht caused accident at Overmeyer warehouse job in Tempe, knocked two men off scaffold.

Herb McKeever, a huge man about 6'6" and 300 lbs., extremely strong, had ulcers and no teeth.

Bob Brim was a small, pudgy man who collected stamps.

John Ducksworth, a very nice, intelligent colored man who rode bike to work, lived off 32nd St., and Roosevelt.

Julius Hamilton had a pointed beard, drank on job.

Name unknown, one-eyed man who worked on Woolco store at Scottsdale and McKellips Rd.

A number of these people worked for us on several different occasions as business fluctuated. There are other people that I can remember by face or incidents that occured, but cannot recall their names due to the time element.

I have read the above statement of 2 pages and it is true and correct to the best of my knowledge.

/s/ JAMES R. YEAGER

Subscribed and sworn to before me this 14th day of October, 1980.

/s/ KATHRYN A. GILLESPIE
Notary Public

My Commission Expires: March 4, 1981

APPENDIX M

AFFIDAVIT

State of Arizona }
} ss.
County of Maricopa }

NOW COMES, Tommy Evans, and being duly sworn, deposes and says:

1. I am currently employed by Clarence R. Yeager Distributors, Inc., as the commercial installation and service supervisor. I started my employment with Yeager in October of 1967. When I first came to work for Yeager, I was an installer. I have held my current position since December of 1977.

2. From 1967 to 1969, we used more than three to six employees due to the volume of our business. We have tried to remember the names of some of the employees who did installation and service work during this period. I can remember that the following employees worked in this capacity: Ken Ballard, John Duckworth, Herbert McKeever, Ed Campbell, Ed Bowers, Ralph Dalia, Jimmy Yeager, Hank Smith, George Curtis, George Conneck. There were other employees who worked during this period whose names I simply can't recall since we no longer have payroll records for this period and it was a long time ago. Dozens of employees have come and gone since that time.

I have read the above statement of two pages and it is true and correct to the best of my knowledge.

/s/ TOMMY EVANS

Subscribed and sworn to before me this 1st day of October, 1980.

/s/ RANDYE MITRANI
Notary Public

My Commission Expires: 9/25/83